Supreme Court, U.S.
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No. _____

In The

# Supreme Court of the United States

GREENWAY ENTERPRISES, INC.,

*Petitioner,*

v.

TONY CASIANO,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Montana**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

In an issue of first impression in the State of Montana, Greenway's counsel objected under *Batson v. Kentucky, infra*, to opposing counsel's use of a peremptory challenge to remove a business owner from the jury. Did the Montana Supreme Court violate Greenway's right to Due Process under the Fourteenth Amendment of the United States Constitution when it refused to consider the merits of Greenway's objection because defense counsel waited until his first opportunity – immediately after the Court dismissed the jury from the courtroom – before he objected?

The identical issue is presently pending before this Honorable Court in a related case, *Ford v. Montana*, Cause No. 01-10070, on Petitioner Eugene Ford's Petition for a Writ of Certiorari to the Montana Supreme Court.

## PARTIES

The Petitioner is Greenway Enterprises, Inc. (hereinafter "Greenway"), a Montana corporation located in Helena, Montana. Greenway is engaged in the business of general construction contracting.

The Respondent is Tony Casiano (hereinafter "Casiano"), an individual residing in Helena, Montana. Casiano was formerly employed by Greenway.

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## PETITION FOR WRIT OF CERTIORARI

Greenway Enterprises, Inc. respectfully petitions this Honorable Court for a writ of certiorari to review the opinion and judgment of the Montana Supreme Court entered on May 9, 2002.

## OPINIONS AND ORDERS BELOW

The opinion and judgment of the Montana Supreme Court was issued on May 9, 2002, and is reported at *Casiano v. Greenway Enterprises, Inc.*, 2002 MT 93, 309 Mont. 358, 47 P.3d 432. *See*, App. A. The Montana Supreme Court denied rehearing on May 30, 2002. *See*, App. E.

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

## STATUTORY AND CONSTITUTIONAL - PROVISIONS INVOLVED

All citizens of this country are guaranteed due process and equal protection under the United States Constitution. The Fourteenth Amendment to the United States Constitution reads:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall

> make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

The Montana Constitution also guarantees that all persons shall enjoy the equal protection of the laws, and expressly forbids discrimination on account of social condition in the exercise of a person's civil rights:

> The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.

Mont. Const. Art. II § 4.

## STATEMENT OF THE CASE

The issue before this Court is whether the Montana Supreme Court violated Greenway's due process rights when the Montana Supreme Court failed to decide the merits of its appeal. *See, e.g., Evitts v. Lucey*, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821(1985) ("[T]he procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the United States Constitution."). Greenway had argued on appeal that the plaintiff's counsel violated Greenway's state and federal constitutional rights when the plaintiff's counsel used a peremptory strike to remove a business

owner from Greenway's jury panel in a wrongful discharge case. In *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), this Court held that the Equal Protection Clause of the United States Constitution forbids the prosecution from challenging potential jurors based solely on account of their race. *Batson* was expanded in *J.E.B. v. Alabama*, 511 U.S. 127, 114 S. Ct. 1419, 1420, 128 L. Ed. 2d 89 (1994) to include challenges based upon gender. The *J.E.B.* Court reinforced that a prosecutor's use of sexually discriminatory peremptory strikes violated the defendant's and the excluded venire person's right to equal protection of the laws. 511 U.S. at 145. This Court explained that "[w]hen persons are excluded from participation in our democratic process solely because of race or gender, [the] promise of equality dims, and the integrity of our judicial system is jeopardized." *Id.* at 146.

This is a wrongful discharge case by a construction laborer against a construction company after the company's project superintendent fired the laborer on the job site for insolence and insubordination. Casiano's Complaint contained three causes of action. In Count 1, Casiano claimed that Ellermeyer's motive in discharging him was to retaliate for filing a claim under the Worker's Compensation Act in violation of § 39-71-317(1), MCA. Count 2 alleged that Casiano's discharge was not for good cause in violation of § 39-2-904(2), MCA. Count 3 alleged that he was discharged in retaliation for his refusal to violate public policy, and that Ellermeyer acted with actual or presumed malice in discharging Casiano in violation of § 39-2-904(1), MCA.

Trial commenced on October 16, 2000, and the jury returned its Special Verdict on October 19, 2000. The jury found that Casiano was not discharged in retaliation for

filing a Worker's Compensation claim. The jury also found that Casiano was not discharged for good cause because Greenway violated the express provisions of its written personnel policy. It therefore awarded $40,908 to Casiano.

During voir dire, prospective juror Jackson Gregg stated that he is partial owner, partner, manager at Collision Pro, a Helena, Montana, business, that he has been managing the collision repair business since 1975, and has been part owner for four years. Jackson Gregg also stated that he has been exposed to an employment dispute, both as an employee and as a manager. He stated that he has had occasions to discipline employees on very short notice.

After defense counsel passed the jury for cause, the parties exercised their peremptory challenges. Casiano's counsel then struck prospective juror Jackson Gregg.

After all challenges were exercised, the clerk announced the names of the selected twelve jurors, and the clerk administered an oath to all of the jurors. The trial court then dismissed the jury for lunch. *See*, App. C.

At his first opportunity, immediately after the final panel was dismissed for lunch, Greenway's counsel informed the trial court that he had a matter for the court. Greenway's counsel immediately moved pursuant to *Batson v. Kentucky* to discharge the jury for the reason that Casiano's counsel impermissibly exercised a peremptory challenge against prospective juror Jackson Gregg based upon Gregg's social status as a Helena business owner. Greenway's counsel reminded the trial court that Gregg was the only juror who owned his own business, Collision Pro, and who had indicated during voir dire that he needed to discipline employees on short notice. App. C,

116:3 to 117:17. In response, Casiano's counsel erroneously stated that "it has always been [his] understanding peremptory challenges can be made for any reason whatsoever and that there is no criteria and there is no basis, there is no case law with respect to the reasons for somebody making a peremptory challenge." He then refused to state the reason he exercised the challenge against prospective juror Jackson Gregg. App. C, 117:18 to 118:16. Greenway's counsel then expressly informed the trial court that peremptory challenges cannot be exercised for unconstitutional reasons under *Batson v. Kentucky* and asked the trial court to require the plaintiff's counsel to state the reason he exercised a peremptory challenge against Jackson Gregg. The trial court then denied Greenway's motion, and did not require Casiano's counsel to state the reason he exercised the peremptory challenge against prospective juror Jackson Gregg. App. C, 118:10-18. The trial court made no ruling on whether Greenway had set forth a prima facie case of discrimination. The trial court made no ruling on the timeliness of Greenway's motion, and made no findings of any kind regarding Greenway's motion. A copy of the trial transcript, pp. 113-118, setting forth Greenway's objection, plaintiff's counsel's response, and the trial court's ruling is attached as App. C.

The jury returned a special verdict against Greenway, awarding Casiano $ 40,908.00 and Greenway appealed to the Montana Supreme Court. On appeal Greenway argued that the Judgment should be set aside and the case should be remanded for a new trial because Greenway was unconstitutionally denied its right to equal protection of the law when plaintiff's counsel purposefully discriminated against prospective juror Jackson Gregg by exercising a peremptory challenge against Gregg in violation of

the United States and Montana Constitutions' guarantee to equal protection of the law. Greenway argued that plaintiff purposefully discriminated against Gregg on account of his social condition because Gregg was owner and manager of Collision Pro, a Helena business. Greenway argued that the trial court committed reversible error when it refused to follow the *Batson* procedure after Greenway had established a prima facie showing of purposeful discrimination based upon social condition. Montana had never before reviewed the issue of a party's discriminatory use of its peremptory challenges. Thus, this was an issue of first impression for the Montana Supreme Court. *See*, 47 P.3d 435.

Casiano responded on appeal that the trial court correctly overruled and denied Greenway's motion because the juror in question was not a member of a "cognizable racial group." He asserted that a peremptory challenge may be exercised without having to explain the reason behind its utilization. He further argued that *Batson* was a criminal case, not a civil case, and for that reason *Batson* did not apply. *See*, 47 P.3d at 435. At no time did Casiano complain, raise, or argue – at trial, on appeal, in its briefing, or ever – that Greenway's *Batson* objection was untimely.

Notwithstanding that, the Montana Supreme Court, *sua sponte*, held that Greenway's objection, made immediately after the jury was sworn, was untimely. Therefore, the Montana Supreme Court affirmed the trial court's denial of Greenway's motion to discharge the jury. *See*, 47 P.3d at 436. The Supreme Court recognized that this was an issue of first impression in Montana. 47 P.3d at 435. Although the Montana Supreme Court recognized that neither the district court, nor Greenway's or Casiano's

counsel had the benefit of its prior decision in *State v. Ford*, 2001 MT 230, 306 Mont. 517, 39 P.3d 108, at the time of trial, it concluded that Greenway's motion was untimely. *See*, 47 P.3d at 436. Although not the law or the firmly established and regularly followed practice in the State of Montana at the time of trial, the Supreme Court cited *Ford* and refused to consider the merits of Greenway's claim, and instead *sua sponte* evaluated the timeliness of Greenway's motion.

Greenway filed a Petition for Rehearing with the Montana Supreme Court and argued that the Supreme Court's opinion was in conflict with this Court's holding in *Ford v. Georgia*, 498 U.S. 411, 111 S. Ct. 850, 112 L. Ed. 2d 935 (1991), in which this Court held that a state court may not reject a *Batson* objection as untimely if the state had no firmly established and regularly followed rule as to when the objection must be made. Greenway also argued that the plaintiff waived any objection to the timeliness of Greenway's motion because the plaintiff's counsel simply refused to state the reasons he exercised the challenge against Jackson Gregg and made no objection or mention about the timeliness of Greenway's motion. Finally, Greenway argued that the objection had been sufficiently timely, and the plaintiff had not been prejudiced because of the timing.

Casiano filed a response to Greenway's Petition for Rehearing and argued that even though the Montana Supreme Court's opinion in *State v. Ford*, 2001 MT 230, 306 Mont. 517, 39 P.3d 108 was decided exactly one year after the *Greenway v. Casiano* trial, *Ford's* reasoning was still valid and the rationale in *Ford* would allow the Montana Supreme Court to make the same determination as it made in its original decision.

The Montana Supreme Court denied Greenway's Petition for Rehearing on May 30, 2002, without explanation. *See*, App. E.

## REASONS FOR GRANTING THE WRIT

### A. The Montana Supreme Court disregarded this Court's holding in *Ford v. Georgia* when it refused to consider the merits of Greenway's motion.

This Court held in *Ford v. Georgia* that since no firmly established rule regarding the timeliness of the *Batson* objection existed in Georgia at the time of the defendant's trial, the Georgia Supreme Court could not bar judicial review of the merits of the defendant's federal equal protection claim. 498 U.S. at 423-425. Although a disagreement existed between the parties regarding the timing of the defendant's objection, this Court assumed that the objection was untimely and found that the issue before the Court was not the timeliness of the objection, but the Georgia Supreme Court's failure to consider the merits of the issue. *Id.* at 416, fn. 4. The prosecutor in *Ford v. Georgia* used nine out of ten strikes to remove blacks from the defendant's jury. *Id.* at 416. The defendant failed to object between the jurors' selection and the administration of their oaths, but instead waited until the afternoon session of the second day of the trial to make an objection. *Id.* On appeal, after a previous remand from this Court, the Georgia Supreme Court, identical to the Montana Supreme Court in Greenway's case, *sua sponte*, refused to consider the merits of the defendant's appeal and instead held that the defendant had failed to make a contemporaneous objection. 498 U.S. at 418.

This Court in *Ford v. Georgia* granted certiorari again, this time in order to determine whether the timeliness rule the Georgia Supreme Court had applied was an adequate state ground that would prevent it from addressing the defendant's *Batson* claim. 498 U.S. at 421, 423-424. This Court explained that while it was a proper exercise of state power to establish a rule governing the timeliness of objections in a state court criminal trial, the court rule could not be applied to prevent the court's review of the defendant's claim. *Id.* Thus, this Court held that, although "a state court may adopt a general rule that a *Batson* claim is untimely if it is raised for the first time on appeal, or after the jury is sworn, or before its members are selected," that rule must be "firmly established and regularly followed" before a state court may use it to bar review of a federal constitutional claim based on *Batson*. *Id.* (citing *James v. Kentucky*, 466 U.S. 341, 104 S. Ct. 1830, 80 L. Ed. 2d 346 (1984)). This Court declared that Georgia's procedural rule did "not even remotely satisfy the requirement" of a firmly established and regularly followed rule. *Id.* at 424. Therefore, since no firmly established rule regarding the timeliness of the *Batson* objection existed in Georgia at the time of the defendant's trial, this Court held that the Georgia Supreme Court could not bar judicial review of the defendant's federal equal protection claim. *Id.* at 425. *See also, NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 457-458, 78 S. Ct. 1163, 1169-1170, 2 L. Ed. 2d 1488 (1958) (This Court refused to apply a state procedural rule because the defendant could not be deemed to have been appraised of its existence: "Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights."); *Lee v. Kemna*,

___ U.S. ___, 122 S. Ct. 877, 151 L. Ed. 2d 280 (2002) (Missouri rules requiring that continuance motions be written and accompanied by an affidavit, applied *sua sponte* by the Missouri Court of Appeals, did not constitute a state ground adequate to bar federal review of the defendant's due process claims).

This Court in *Batson* never specified when an objection must be made in order to be timely. *Ford v. Georgia*, 498 U.S. at 423; *State v. Ford*, 39 P.3d at 112. In *Ford v. Georgia*, this Court explained that states should be given the opportunity to adopt a rule of when a *Batson* objection must be made. Accordingly, the Montana Supreme Court's decision in Greenway's case, setting forth a rule that a *Batson* objection must be made before the jury is sworn to be considered timely, is a reasonable rule. However, since Greenway's case was an issue of first impression and no previous rule existed in Montana, the Montana Supreme Court's decision is in conflict with this Court's holding in *Ford v. Georgia* because Greenway did not have any previous rule to guide its counsel in making its objection. Just as Georgia could not use a procedural rule to bar the defendant's *Batson* claim, the Montana Supreme Court should have decided Greenway's equal protection claim on the merits.

The Montana Supreme Court's decision further disregards precedent from other states which have correctly followed *Ford v. Georgia*. Other courts have recognized that a state court cannot deny a defendant's *Batson* claim because of an untimely objection unless a firmly established and regularly followed state practice already exists. In *State v. Burch*, 830 P.2d 357, 360 (Wash. 1992), the defendant raised a *Batson* objection after the venire persons were excused and the jury sworn. On appeal, the

state argued that Burch had waived his right to appellate review because he brought his *Batson* objection after the jury was impaneled. 830 P.2d at 363. Although *Batson* had been decided two years before the defendant's trial, the Court of Appeals in *Burch* relied upon and cited to *Ford v. Georgia*. The appellate court thus held that since Washington had not yet adopted a rule when a *Batson* objection must be raised, Burch was not procedurally barred from raising his *Batson* claim.

In *State v. Harris*, 754 P.2d 1139 (Ariz. 1988), the Court held that a *Batson* objection made the day *after* the parties had exercised their peremptory strikes was untimely. The defendant filed a petition for postconviction relief after this Court decided *Ford v. Georgia*. *State v. Harris*, 852 P.2d 1248 (Ct. of App. of Ariz. 1993). The Court of Appeals, on appeal from the district court's denial of the defendant's postconviction petition, recognized that it could not bar a *Batson* claim based on an untimely objection if the state procedural rule was not firmly in place before the defendant's trial. 852 P.2d at 1250 (citing *Ford v. Georgia*, 498 U.S. at 422-425). However, Arizona already had, before the defendant's trial, a firmly established rule that provided when a party must make a *Batson* challenge. *Id.* The Arizona timeliness rule had been reviewed and addressed by the Arizona Supreme Court on several occasions. *Id.* Therefore, the Arizona Court of Appeals held that the defendant's *Batson* objection, not made until the day *after* the trial court had impaneled the jury, was an untimely objection. 852 P.2d at 1250-1251. *See also*, *State v. Wright*, 896 P.2d 713 (Wash. 1995) (Court refused to find that a defendant had waived his right to raise a *Batson* issue for the first time on appeal in the absence of a court ruling defining proper procedures for such challenges);

and *Calhoun v. Purvis*, 425 S. E. 2d 901, 904 (Ga. 1993). ("[W]e will not reject the *Batson/Edmonson* claim as untimely 'because there have been no judicial guidelines regarding the time and manner in which such a claim is to be presented, and because plaintiffs' motion in this regard was made relatively promptly in the course of the proceedings.'") (Citation omitted).

Contrary to *State v. Harris*, Greenway's *Batson* claim was an issue of first impression for the Montana Supreme Court. *See*, *State v. Ford*, 39 P.3d at 109, 113; *Casiano v. Greenway*, 47 P.3d at 435. Therefore, similar to *Ford v. Georgia*, when Greenway's defense counsel made his objection, no firmly established and regularly followed state rule existed to guide him. Greenway's counsel objected at his first opportunity immediately after the impaneling of the jury and before the trial began. Plaintiff's counsel simply refused to state the reasons for his strike, without once complaining about the timing of Greenway's motion. As the trial had yet to begin when Greenway made its objection, the court still could have dismissed the jury panel without prejudice to either party. Greenway's objection was reasonable in the absence of any established rule. The merits of the issues raised by Greenway should have been considered by the Montana Supreme Court.

**B. Greenway's challenge to Casiano's use of a peremptory challenge to remove a business owner from the jury was an issue of first impression in Montana. Therefore, no adequate and independent state grounds existed for the Montana Supreme Court to *sua sponte* deny Greenway relief on procedural grounds without reaching the merits of its claims.**

Montana has never prescribed when a *Batson* objection must be made, either by state statute, local rule of court, or Supreme Court opinion. The law, rules, and practice in the State of Montana are thus completely silent as to when a trial attorney in a civil or criminal case must object to a party's discriminatory exercise of its peremptory strikes. *See*, § 25-7-221, MCA; § 25-7-224, MCA; Mont.R.Civ.P. 47(b) (civil case); §§ 46-16-116 and 117, MCA (criminal case); Title 25, Chapter 19, Montana Code (Montana Uniform District Court Rules). Therefore, contrary to attorneys in other states[1], Greenway's counsel had no Montana case, rule, or statute to guide him when he objected after Casiano's counsel improperly exercised his challenge against Jackson Gregg.

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[1] Alabama (Ala. Code § 12-16-56); Delaware (Del. Code Ann. 10 § 4502); District of Columbia (D.C. Code Ann. § 11-1903); Hawaii (Haw. Rev. Stat. § 612-2); Idaho (Idaho Code § 2-203); Indiana (Ind. Code Ann. § 35-46-2-2); Iowa (Iowa Code Ann. § 607A.2); Louisiana (La. Code Crim. Proc. art. 419); Maine (Me. Rev. Stat. Ann. § 1202-A); Minnesota (Minn. Stat. Ann. § 593.32); Mississippi (Miss. Code Ann. § 13-5-2); Nebraska (Neb. Rev. Stat. § 25-1601.03); New Hampshire (N.H. Rev. Stat. Ann. § 500-A:4); New Mexico (N.M. Stat. Ann. § 38-5-3); North Carolina (N.C. Const. Art. I, § 26); North Dakota (N.D. Cent. Code § 27-09.1-02); Ohio (Ohio Rev. Code Ann. § 2323.47); Oregon (Or. Rev. Stat. § 10.030); Texas (Tex. Code Crim. Proc. art. 35.261); Utah (Utah Code Ann. § 78-46-3); and West Virginia (W. Va. Code § 52-1-2).

*Batson* and its progeny focus on the harm caused to the entire community when discrimination invades the jury selection process. *Batson*, 476 U.S. at 87 ("The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community."); *See also*, *Powers v. Ohio*, 499 U.S. 400, 406, 111 S. Ct. 1364, 1368, 113 L. Ed. 2d 411 (1991) ("*Batson* 'was designed 'to serve multitude ends,' 'only one of which was to protect individual defendants from discrimination in the selection of jurors.' ") (citations omitted); *Georgia v. McCollum*, 505 U.S. 42, 49, 112 S. Ct. 2348, 2353, 120 L. Ed. 2d 33 (1992) ("[T]he extension of *Batson* in this context is designed to remedy the harm done to the 'dignity of the persons' and the integrity of the courts.") (citations omitted); *J.E.B. v. Alabama*, 511 U.S. at 146 (" '[W]ith the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.' ") (citation omitted). As other courts have recognized, it is the integrity of the entire process that is at stake. Nothing in the Montana Code addresses when a *Batson* challenge must be made.

Greenway objected to Casiano's discriminatory method of using his peremptory strike to remove a business owner. The Montana Code is silent as to when Greenway was required to make such an objection. Since no Montana cases, statutes, rules, or practice existed to govern the timing of Greenway's objection, it was understandable that Greenway's attorney would not object until the first opportunity. Based on *Ford v. Georgia*, the Montana Supreme Court should have considered the merits of Greenway's constitutional arguments.

## CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

DATED this 5th day of August, 2002.

Respectfully submitted,

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**APPENDIX A**

No. 01-136

IN THE SUPREME COURT
OF THE STATE OF MONTANA

2002 MT 93

---

TONY CASIANO,

Plaintiff/Respondent/Cross-Appellant,

v.

GREENWAY ENTERPRISES, INC.,

Defendant/Appellant/Cross-Respondent.

---

(Filed May 9, 2002)

APPEAL FROM: District Court of the First Judicial District
In and for the County of Lewis and Clark,
The Honorable Jeffrey Sherlock, Judge Presiding.

COUNSEL OF RECORD:

For Appellant:

Palmer A. Hoovestal, Hoovestal & Kakuk, PLLC, Helena, Montana

For Respondent:

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Submitted on Briefs: September 27, 2001
Decided: May 9, 2002

Filed:

/s/ Ed Smith
Clerk

Justice JIM REGNIER delivered the Opinion of the Court.

¶ 1 Greenway Enterprises, Inc. ("Greenway") appeals from the rulings made by the First Judicial District Court, Lewis and Clark County, denying its: 1) third motion for summary judgment, 2) motion to discharge the jury, and 3) motion for judgment as a matter of law, or alternatively, for a new trial. We affirm.

¶ 2 The following issues are presented on appeal:

¶ 3 1. Did the District Court err in denying Greenway's third motion for summary judgment?

¶ 4 2. Did the District Court err in denying Greenway's motion to discharge the jury?

¶ 5 3. Did the District Court err in denying Greenway's motion for judgment as a matter of law, or alternatively, for a new trial?

## FACTUAL AND PROCEDURAL BACKGROUND

¶ 6 Greenway is a Montana corporation located in Helena, Montana. Tony Casiano ("Casiano") was hired by Greenway as a construction laborer in October 1997. On April 27, 1998, Casiano completed Greenway's six month probationary period. During Casiano's employment at Greenway, he worked on several projects, including the

construction of a surgical center next to St. Peter's Hospital in Helena ("the Surgi-Center project").

¶ 7 On July 17, 1998, while working at the Surgi-Center project, Casiano was discharged from his employment by his supervisor, John Ellermeyer, for alleged insubordination. That same day, Jon Hoovestal, Vice President of Greenway, informed Casiano of Greenway's written internal grievance procedures. Greenway did not provide Casiano a written copy of its grievance procedures after his discharge.

¶ 8 On April 7, 1999, Casiano filed a complaint against Greenway under the Montana Wrongful Discharge Act alleging that: 1) his discharge was in retaliation for filing a worker's compensation claim in violation of § 39-71-317(1), MCA; 2) his discharge was not for good cause in violation of § 39-2-904(2), MCA; and 3) his discharge was in retaliation for refusing to violate public policy in violation of § 39-2-904(1), MCA.

¶ 9 On August 1, 2000, Greenway filed a third motion for summary judgment alleging Casiano's action was barred by § 39-2-911(2), MCA, since he failed to first exhaust Greenway's internal grievance procedures prior to filing his action in the District Court. Relying on our holding in *Eadus v. Wheatland Memorial Hospital* (1996), 279 Mont. 216, 926 P.2d 752, the District Court entered an order denying Greenway's motion on September 12, 2000. The court determined that Casiano's action was not barred by § 39-2-911, MCA, as Greenway did not provide Casiano a written copy of its internal grievance procedures within seven days after his discharge in compliance with § 39-2-911(3), MCA.

¶ 10 A jury trial commenced on October 16, 2000. After the jury was selected, sworn, and the venire were excused, Greenway's counsel moved to discharge the jury pursuant to *Batson v. Kentucky* (1986), 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69. Greenway alleged Casiano's counsel impermissibly exercised a peremptory challenge against a prospective juror based upon the prospective juror's social condition as a Helena business owner. Additionally, Greenway requested that Casiano's counsel state why a peremptory challenge was exercised against the prospective juror. The District Court denied Greenway's motion and did not require Casiano's counsel to state the reason employed in exercising a peremptory challenge against the prospective juror.

¶ 11 On October 19, 2000, the jury returned a special verdict finding that Casiano was not discharged in retaliation for filing a worker's compensation claim. The jury further found that Casiano was not discharged for good cause because Greenway violated the express provisions of its written personnel policy. The jury awarded Casiano damages in the amount $40,908.00.

¶ 12 On October 26, 2000, Greenway filed a motion for judgment as a matter of law, or alternatively, for a new trial claiming there was insufficient evidence to support the jury's damage award of $40,908.00. On November 16, 2000, the District Court denied Greenway's motion finding there was not a complete absence of credible evidence to support the jury's verdict. On the same day, the District Court entered judgment in the amount of $43,777.33 against Greenway. Greenway appeals.

## STANDARD OF REVIEW

¶ 13 Our review of a district court's grant or denial of a motion for summary judgment is de novo. *See Eadus v. Wheatland Memorial Hospital & Nursing Home* (1996), 279 Mont. 216, 219, 926 P.2d 752, 754 (citation omitted). Therefore, we apply the same Rule 56, M.R.Civ.P., criteria as applied by the district court. *See Bruner v. Yellowstone County* (1995), 272 Mont. 261, 264, 900 P.2d 901, 903. Pursuant to Rule 56, M.R.Civ.P.:

> The movant must demonstrate that no genuine issues of material fact exist. Once this has been accomplished, the burden then shifts to the non-moving party to prove, by more than mere denial and speculation, that a genuine issue does exist. Having determined that genuine issues of fact do not exist, the court must then determine whether the moving party is entitled to judgment as a matter of law. We review the legal determinations made by a district court as to whether the court erred.

*Bruner,* 272 Mont. at 264, 900 P.2d at 903 (citations omitted).

¶ 14 In reviewing a district court's denial of a motion to discharge the jury based upon a *Batson* challenge, we will defer to the district court's findings of fact unless clearly erroneous, and will review the district court's application of the law de novo. *See State v. Ford,* 2001 MT 230, ¶ 7, 306 Mont. 517, ¶ 7, 39 P.3d 108, ¶ 7 (citations omitted).

¶ 15 We will not reverse a district court's denial of a motion for judgment as a matter of law unless there is a complete absence of credible evidence to support the jury's verdict. *See Kneeland v. Luzenac America, Inc.,* 1998 MT

136, ¶ 53, 289 Mont. 201, ¶ 53, 961 P.2d 725, ¶ 53 (citations omitted). In reviewing the evidence, we view the evidence in the light most favorable to the prevailing party. *See Kneeland,* ¶ 51 (citations omitted).

¶ 16 We review a district court's denial of a motion for a new trial for an abuse of discretion. *Kneeland,* ¶ 54 (citation omitted).

## DISCUSSION

### ISSUE ONE

¶ 17 Did the District Court err in denying Greenway's third motion for summary judgment?

¶ 18 Greenway contends Casiano's wrongful discharge action is precluded by § 39-2-911(2), MCA, because Casiano failed to exhaust its internal grievance procedures prior to filing his action in the District Court. Additionally, Greenway asserts the requirements of § 39-2-911(3), MCA, were satisfied since it provided Casiano a written copy of its grievance procedures during his employment, and Jon Hoovestal, Vice President of Greenway, expressly told Casiano about its internal grievance procedures and how to facilitate such procedures on the day of his discharge. Greenway alleges that although it did not provide Casiano a written copy of its grievance procedures within seven days of his discharge, Hoovestal's oral explanation equates to supplying a copy of its grievance procedures to Casiano in compliance with § 39-2-911(3), MCA. Greenway further claims the facts presented in *Eadus* are distinguishable from the facts in this case, as there was no evidence in *Eadus* that the employer's grievance procedure was orally explained to the employee.

¶ 19 Casiano responds that Greenway's failure to provide him a written copy of its internal grievance procedures within seven days of his discharge, as required by § 39-2-911(3), MCA, precludes Greenway from availing itself of the defense set forth in § 39-2-911(2), MCA, pursuant to our decision in *Eadus*. Casiano points out that the facts presented in *Eadus* are analogous to the facts presented in the case at hand. Most notably, the employee in *Eadus*, as here, was provided a written copy of the employer's internal grievance procedures during her employment, but was not provided another copy within seven days of her discharge. Further, the employer in *Eadus*, as here, notified the employee of its written internal grievance procedures on the day of her discharge. Casiano therefore contends we should affirm the District Court's denial of Greenway's third motion for summary judgment. We agree.

¶ 20 Section 39-2-911(3), MCA, states:

> If the employer maintains written internal procedures under which an employee may appeal a discharge within the organizational structure of the employer, the employer shall within 7 days of the date of the discharge notify the discharged employee of the existence of such procedures *and shall supply the discharged employee with a copy of them. If the employer fails to comply with this subsection, the discharged employee need not comply with subsection (2).*
>
> [Emphasis added.]

¶ 21 We held in *Eadus* that the plain language of § 39-2-911(3), MCA, precludes an employer from availing itself of the defense set forth in § 39-2-911(2), MCA, if the employer fails both to notify the discharged employee of its internal grievance procedures and to provide the employee

a written copy of its internal grievance procedures within seven days of the employee's discharge. *See Eadus,* 279 Mont. at 222, 926 P.2d at 756. Here, it is undisputed that Greenway notified Casiano of its internal grievance procedures on the day of his discharge, but failed to provide him a written copy of the procedures within seven days of his discharge. Consequently, we conclude that Greenway did not comply with § 39-2-911(3), MCA, and thus Casiano was not required to comply with § 39-2-911(2), MCA, prior to filing his action. Accordingly, we hold that the District Court did not err in denying Greenway's motion for summary judgment.

ISSUE TWO

¶ 22 Did the District Court err in denying Greenway's motion to discharge the jury?

¶ 23 Relying upon *Batson v. Kentucky* (1986), 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69, Greenway contends its constitutional right to equal protection of the law, guaranteed by Article II, § 4, of the Montana Constitution, was denied when Casiano's counsel exercised a peremptory challenge against a prospective juror based upon the prospective juror's social condition as a Helena business owner. Greenway additionally alleges the District Court committed reversible error when it failed to require Casiano's counsel to provide reasons why it exercised a peremptory challenge against the prospective juror.

¶ 24 Casiano asserts a peremptory challenge may be exercised without having to explain the reason behind its utilization. Moreover, Casiano points out that *Batson* and its progeny involve discrimination of members of a cognizable racial group or a suspect class in the jury selection

process. Casiano thus claims that a *Batson* challenge is not applicable in the case at hand since the prospective juror excused in this case is not a member of a cognizable racial group or suspect class.

¶ 25 The issue of discrimination based on social condition in jury selection is a matter of first impression for this Court. The United States Supreme Court has held that the Equal Protection Clause of the United States Constitution forbids the State in criminal cases from utilizing peremptory challenges to remove potential jurors based solely on their race. *Batson,* 476 U.S. at 89, 106 S.Ct. at 1719. The Court has expanded the scope of *Batson* to forbid defendants in criminal cases and litigants in civil cases from utilizing peremptory challenges to exclude prospective jurors based on race. *See Georgia v. McCollum* (1992), 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed.2d 33; and *Edmonson v. Leesville Concrete Co.* (1991), 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660. The Court further broadened the application of *Batson* to preclude the use of peremptory challenges to exclude jurors based upon their gender in *J.E.B. v. Alabama ex rel. T.B.* (1994), 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89.

¶ 26 We have held that "[w]hile defendants have a right 'to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria,' *Batson,* 476 U.S. at 85-86, 106 S.Ct. at 1717, this right must be exercised in a timely manner." *State v. Ford,* 2001 MT 230, ¶ 21, 306 Mont. 517, ¶ 21, 39 P.3d 108, ¶ 21 (citation omitted). Accordingly, we must address whether Greenway's *Batson* challenge was timely made before we address the merits of its challenge.

¶ 27 We determined in *Ford* that a *Batson* challenge must be made prior to the impanelment of the jury and the

dismissal of the venire to be timely. *Ford,* ¶ 28. In determining the point in the proceedings when a *Batson* challenge should timely be made, we noted that:

> If we allow a *Batson* challenge to be raised after the jury is impaneled and sworn and the venire dismissed, we not only impair the ability of the challenged attorney to effectively defend his or her strikes, but we also deprive the district court of the ability to correct any error in the proceedings in a timely fashion. While we have not previously addressed the *Batson* challenge explicitly, the concept of requiring a substantive challenge to be brought while the district court still has the opportunity to cure the alleged defect is not novel. We have consistently held that the purpose of a timely objection is to give a district judge the first opportunity to correct any error.

*Ford,* ¶ 27 (citations omitted).

¶ 28 Here, Greenway's counsel moved to discharge the jury based upon *Batson* and its progeny after the jury was selected, sworn, and the venire excused. We note that neither counsel in this case nor the District Court had the benefit of our *Ford* decision at the time of trial. However, our decision in *Ford* controls. Therefore, we conclude that Greenway's *Batson* challenge was untimely. Hence, we will not address the merits of Greenway's *Batson* challenge. Accordingly, we affirm the District Court's denial of Greenway's motion to discharge the jury.

## ISSUE THREE

¶ 29 Did the District Court err in denying Greenway's motion for judgment as a matter of law, or alternatively, for a new trial?

¶ 30 Greenway points out that the jury's damage award of $40,908.00 was based on the assumption that Casiano would have remained employed with the company for four years had he not been wrongfully discharged from his employment. Greenway alleges, however, the evidence presented at trial was uncontroverted that Casiano would have been laid off due to lack of work on November 31,1998, when the Surgi-Center project was completed, as were all hourly employees. Greenway therefore maintains the jury award should be reduced to $8,018.00, the amount of money Casiano would have earned at his hourly wage from the date of his discharge through November 31, 1998.

¶ 31 Casiano claims contradictory evidence was presented at trial regarding whether he would have continued to work for Greenway after the Surgi-Center project was completed. Notably, Casiano points out that Greenway continued his employment in the winter of 1997-1998 although there was not a construction project, and thus the jury could have made a reasonable inference from this evidence that Greenway would have continued his employment after completion of the Surgi-Center project. Casiano therefore contends there was not a complete absence of credible evidence to support the jury's verdict. We agree.

¶ 32 Further, we agree with the rationale stated by the District Court in denying Greenway's motion. In its November 16, 2000, Order, the District Court stated:

> In looking at the evidence, the Court would acknowledge that if it was the trier of fact, it would have to agree with Defendant's argument. However, the Court cannot say that there is a *complete* absence of credible evidence to support the jury's verdict. The jury was in a position to judge the credibility of Defendant's witnesses and must

> have believed that Casiano would have continued to work for Greenway as did John Ellermeyer. Although this Court might disagree with the jury's conclusion in this regard, it cannot say that there is a complete lack of credible evidence to support the verdict.

¶ 33 Since reasonable inferences could have been made from the evidence that Greenway would have continued Casiano's employment after the completion of the Surgi-Center project, we conclude there was not a complete absence of evidence to support the jury's verdict. Accordingly, we affirm the District Court's denial of Greenway's motion for judgment as a matter of law, or alternatively, for a new trial.

¶ 34 We note in passing that Casiano requests the imposition of sanctions against Greenway on the grounds that Greenway's appeal was taken without substantial or reasonable grounds, pursuant to Rule 32, M.R.App.P. After reviewing the record and the arguments made by Greenway, we conclude that sanctions are not appropriate in this case.

¶ 35 Affirmed.

/s/ Jim Regnier
Justice

We Concur:

/s/ Karla M. Gray
Chief Justice

/s/ James Nelson

/s/ Patricia Cotter

/s/ Jim Rice
Justices

## APPENDIX B

MONTANA FIRST JUDICIAL DISTRICT COURT,
LEWIS & CLARK COUNTY

| | |
|---|---|
| TONY CASIANO,<br>Plaintiff,<br>v.<br>GREENWAY ENTERPRISES, INC.<br>Defendant. | ) Cause No. BDV 99-223<br>) FINAL JUDGMENT ON REMITTITUR<br>) (Filed June 26, 2002) |

Upon the motion of Plaintiff's counsel, the court having considered Plaintiff's Memorandum of Costs on Appeal filed June 13, 2002, no objection having been filed by Defendant, and being fully advised.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED

That the Plaintiff Tony Casiano have and recover from Defendant the sum of $43,777.33 together with interest from the date of the judgment dated November 16, 2000 of $7,040.35, together with costs on appeal of $166.48, for a total of $50,984.16. Interest will continue to accrue at the rate of $11.9938 per day until paid in full.

Dated this 26 day of June, 2002.

JEFFREY SHERLOCK
District Judge

c: Candace Payne
Palmer Hoovestal

**APPENDIX C**

MONTANA FIRST JUDICIAL DISTRICT COURT

LEWIS AND CLARK COUNTY

| | |
|---|---|
| TONY CASIANO,<br>Plaintiff,<br>vs.<br>GREENWAY ENTERPRISES, INC.<br>Defendant. | ) CAUSE NO. BDV-99-223 |

REPORTER'S TRANSCRIPT ON APPEAL

JURY TRIAL

Courtroom
Lewis and Clark County
Courthouse
Helena, MT
October 16, 17, 18, 19, 2000
Volume I (1-238)

HON. JEFFREY M. SHERLOCK,
DISTRICT JUDGE, PRESIDING

APPEARANCES

FOR THE PLAINTIFF: GARY L. DAVIS
CANDACE C. PAYNE
LUXAN & MURFITT
MONTANA CLUB
BUILDING
HELENA, MT 59601

FOR THE DEFENDANT: PALMER A. HOOVESTAL
ATTORNEY AT LAW
P.O. BOX 747
HELENA, MT 59601

* * *

[113] and regard it with the dignity and with the importance that it deserves?

MR. HOOVESTAL: Your Honor, I pass the jury for cause.

THE COURT: Okay. Very good. Ladies and gentlemen, I think what we'll do, we'll take a short break, instead of – I don't want to let you go home for lunch and then come back. I think you would prefer to know right know [sic] if you are going to be on the jury. We'll take a short break. Go to the jury room.

Again, please don't discuss the case among yourselves or with anyone else and don't form or express an opinion until it's submitted to you. We'll call you back in a few minutes, and we'll select or seat the 12 of you who will be on the jury, and the rest of you can go home. So the 12 of you on the jury, we'll go home for lunch and you'll be on the jury for the next three or four days.

So with that, head back to the jury room, and we'll call you back in a few minutes.

(Whereupon, a recess was held.)

THE COURT: Please have a seat.

Ladies and gentlemen, at this time Sue [114] will call the names of the 12 of you who are lucky enough to be on the jury. And as your name is called, I would ask that you come up here and have a seat in our jury box with the first person being in this front row in the seat closest to me, and we'll go on down to juror number 6, and then start back here behind the first juror, as well.

If you're passed over as we go along, that is your hint that you haven't been selected. So, Sue, if you would.

THE CLERK: Gary Cloninger.

JUROR: Time to go home?

THE COURT: No, you're staying.

THE CLERK: Mary Ranger.

Eva Clark.

Vickie Hermanson.

Joseph Nugent.

Alan Vanderwey.

Leslie Saisbury.

Richard Payne.

Richard Frankfurter.

Chris Koski.

Randy Jensen.

Angie Hornby.

THE COURT: All righty. You folks who [115] weren't chosen, I want to thank you very much for coming. I know you're very disappointed. You're heartbroken. But your name will go back in our hat, and we may draw you over the next couple of months. So thank you very much, and you're free to go.

Ladies and gentlemen, I just want to tell you a little bit about what we're going to do now. The law requires that you be placed under oath. So in just a minute, I'll

have Sue place you under oath, and then we'll break for lunch. But when we come back from lunch, I will read you some very general instructions that are generic in nature that apply to all civil cases. You'll get those in writing at the end of the case, as well. And then the lawyers will make their opening statements telling you what they expect to prove. And when that is done, then Mr. Davis will begin with his case.

So with that, I would ask please stand up and raise your right hands.

(Whereupon, the jury was sworn.)

THE COURT: Okay. So I won't make you sit down. I'm going to let you go. Come back at 1:30. And go to the jury room and then Sue will [116] bring you back in. Okay. See you at 1:30, folks.

(Out of the presence of the jury.)

MR. HOOVESTAL: Your Honor, I have a matter for the court.

THE COURT: Palmer, what do you have for us?

MR. HOOVESTAL: Your Honor, I have – I would like to move the court to discharge this jury, and the basis is Batson v. Kentucky, which provides that a party cannot exercise a peremptory challenge which violates the constitutional rights of a prospective jury. In this instance, the plaintiff has discharged in particular Mr. Jackson Gregg who they tried to get off by way of cause, cause challenge. I objected to it. Mr. Gregg was required to stay here. Mr. Gregg indicated that on – during voir dire that he has needed to discipline employees on short notice. Similarly, Mr. Gregg has – is virtually the

only employee who owns his own business. He owns Collision Pro, as the court heard him state during voir dire. Article II, section 4 of the Montana Constitution provides that the dignity of the human being is enviable. No person shall be denied the equal protection of the laws. Neither the state nor any [117] person, firm, corporation or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin.

I think that I have established the necessary elements under the Batson v. Kentucky for the plaintiff here to explain to the court the reasons why they executed – or exercised, rather, peremptory challenge number two against Jackson Gregg. It's our contention that he has a constitutional right to serve on a jury. And it is our contention also that the plaintiff exercised their peremptory challenges against Mr. Gregg because he's a business owner, and that directly lies in contradiction with Section 4 Article II of the Montana Constitution based on his social status.

MR. DAVIS: As I recall, Mr. Gregg is the one that said he wanted to go up to Kalispell to see his parents off for the winter. And Mr. Hoovestal – the court asked if there was an objection to his being excused, and I believe it was Mr. Hoovestal that objected to him being excused.

With respect to the issue of peremptory [118] challenge, it's always been my understanding peremptory challenges can be made for any reason whatsoever and that there is no criteria and there is no basis, there is no case law with respect to the reasons for somebody making a peremptory challenge. I respectfully decline to state the

reasons why we exercised a peremptory challenge against Mr. Gregg.

THE COURT: Okay.

MR. HOOVESTAL: Batson v. Kentucky is very clear. You cannot exercise a peremptory challenge for another unconstitutional reason. And the case law relating to Batson v. Kentucky requires them to – requires them to state on the record the reasons for doing it. We request the court require the plaintiff in this case to do so.

THE COURT: Okay. Well, I won't do that. And I'll deny the motion. Okay. We'll see you back here at 1:20 or so.

(Whereupon, the noon recess was held.)

(Out of the presence of the jury.)

THE COURT: Please be seated.

MR. DAVIS: As we proceed into the testimony this afternoon, the issue is going to come up, which has been raised before, and that has

* * *

## APPENDIX D

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COURT, LEWIS & CLARK COUNTY

| | | |
|---|---|---|
| TONY CASIANO,<br>Plaintiff,<br>v.<br>GREENWAY ENTERPRISES, INC.,<br>Defendant. | ) | Cause No.<br>BDV 99-223<br><br>**JUDGMENT**<br><br>(Filed Nov. 16, 2000) |

This cause having been tried by jury commencing October 16, 2000. The issues were tried, and the jury returned its verdict, and;

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED

That the Plaintiff Tony Casiano recover from the Defendant Greenway Enterprises, Inc., the sum of $40,908.00 with interest thereon at the rate of 10% as provided by law and his costs of action in the amount of $2,869.33, for a total of $43,777.33.

DATED this 16th day of Nov, 2000.

JEFFREY M. SHERLOCK
Jeffrey M. Sherlock
District Judge

cc: Gary L. Davis
Palmer Hoovestal

**APPENDIX E**

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 01-136

| | | |
|---|---|---|
| TONY CASIANO,<br>Plaintiff/Respondent/<br>Cross-Appellant,<br>v.<br>GREENWAY ENTERPRISES, INC.,<br>Defendant/Appellant/<br>Cross-Respondent. | ) | ORDER<br>(Filed Jun. 03, 2002) |

IT IS HEREBY ORDERED that the Petition for Rehearing filed with this Court on May 17, 2002, is DENIED.

DATED this 30th day of May, 2002.

/s/ Karla M. Gray
Chief Justice

/s/ Jim Regnier

/s/ James Nelson

/s/ Patricia Cotter

/s/ Jim Rice
Justices

No. 02-214

Supreme Court, U.S.
FILED
OCT 9 2002
OFFICE OF THE CLERK

In The

# Supreme Court of the United States

GREENWAY ENTERPRISES, INC.,

*Petitioner,*

v.

TONY CASIANO,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Montana**

## BRIEF IN OPPOSITION

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OR CALL COLLECT (402) 342-2831

## QUESTION PRESENTED

After the venire was dismissed and the selected jury was sworn, counsel for Greenway Enterprises, Inc. raised what he purported to be a *Batson* objection to one of Plaintiff's peremptory juror challenges on the basis of the potential juror's **social status** as a business owner. On the basis of reasoning presented in *State v. Ford*, 2001 MT 230, 306 Mont. 517, 39 P.3d 108, a case it had decided shortly after the initial denial of Greenway's *Batson* objection, the Montana Supreme Court determined that Greenway's objection was untimely. The issue here is whether this Court should grant a writ of certiorari where neither the Petitioner nor the juror involved were members of a class protected by *Batson* and where Petitioner's objection was made wholly on the basis of the Constitution of the State of Montana. Also at issue here is whether this Court should grant a writ of certiorari to determine whether requiring a substantive challenge to be brought while the district court still had the opportunity to cure the alleged defect was not procedurally novel, and therefore, did not preclude a *sua sponte* ruling on that issue by the Montana Court.

Although Petitioner asserts that the identical issue is presently pending before this Court in *Ford v. Montana*, Cause No. 01-10070, the Petitioner in that case based his initial objection on gender, a class recognized by decisions following *Batson*.

## PARTIES

The Petitioner is Greenway Enterprises, Inc. (hereinafter "Greenway"), a Montana corporation located in Helena, Montana, and engaged in the business of general construction contracting.

The Respondent, Tony Casiano is Hispanic and was formerly employed as a laborer for Greenway. Mr. Casiano currently resides in Helena, Montana.

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## RESPONSE TO MOTION FOR CERTIORARI JURISDICTION

This is a *Batson* case in name only. (*See Batson v. Kentucky*, 476 U.S. 79 (1986)). This Court does not have jurisdiction under 28 U.S.C. § 1257 (2001) because the Petitioner's claim arises solely under the Montana Constitution, Article II, Section 4[1] and not the United States Constitution. (*See* Pet. App. A page 8). Petitioner's supposed *Batson* objection was made with respect to the juror's ***social status*** as a business owner, a class not recognized by any federal law as being entitled to the protections afforded under this Court's ruling in *Batson v. Kentucky*, or the Fourteenth Amendment of the Constitution of the United States.

## STATEMENT OF THE CASE

This case involved a wrongful discharge suit by laborer Tony Casiano against his employer Greenway Enterprises, Inc. After the venire was dismissed and the selected jury was sworn, counsel for Greenway moved the court to discharge the jury on the basis of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986), a criminal case involving the challenge of a potential juror on account of

[1] Section 4 article II of the Montana Constitution provides that "[t]he dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas."

his race. In explaining the motion, Greenway's Counsel stated "And it is our contention that the plaintiff exercised their peremptory challenges against Mr. Gregg because he's a business owner, *and that directly lies in contradiction with Section 4 Article II of the Montana Constitution based on his social status*." (Pet. App. 18 - C.) (Emphasis added.) At no point did counsel for Greenway make the prima facie showing that the basis for the peremptory challenge was race or gender as required by *Batson* and its progeny. The state District Court denied the motion.

After a three-day trial, the jury found that Tony Casiano had been discharged without good cause, and that Greenway had violated the express provisions of its own written personnel policy and awarded $40,908.00 in damages to Tony Casiano. Greenway filed a Motion for Judgment as a Matter of Law, or alternatively, for a new trial on the basis of the damages awarded. The District Court denied that motion, awarded costs and interest, and entered judgment for $43,777.33.

Greenway appealed to the Montana Supreme Court. The Montana Supreme Court affirmed the jury's verdict on counts one and three, and basing its reasoning on *State v. Ford*, 2001 MT 230, 306 Mont. 517, 39 P.3d 108, held that Greenway's *Batson* challenge was untimely.

The Montana Court's analysis of this case under a *Batson* objection was erroneous and somewhat ironic, because the only affected individual who is a member of a cognizable racial group, required by *Batson* to establish a prima facie case of purposeful discrimination in selection of the petit jury, is Respondent Tony Casiano. Tony Casiano is of Hispanic origin. (*See* Resp. App. A). People of

Hispanic origin were recognized as entitled to the specific protections of *Batson* in *Hernandez v. New York*, 500 U.S. 352 (1991).

Conversely, Petitioner Greenway Enterprises, Inc. is not and did not establish that it or the supposedly wrongfully excluded juror was a member of a cognizable racial group or suspect class, and because of that, did not establish a prima facie case of purposeful discrimination in selection of the petit jury via peremptory challenges as required by the *Batson* decision.

## REASONS FOR DENYING THE WRIT

### 1. The "social status" objection raised by Greenway does not raise a cognizable claim under *Batson* or the Fourteenth Amendment of the Constitution of the United States.

*Batson v. Kentucky* held that to establish a prima facie case of purposeful discrimination in selection of the petit jury, defendant must first show that he is a member of a cognizable racial group, that the prosecutor had exercised peremptory challenges to remove from the venire members of the defendant's race and that the facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the venireman from the petit jury on account of their race. *Batson v. Kentucky*, 476 U.S. 79 (1986).

In *Powers v. Ohio,* 499 U.S. 400 (1991), *Batson* was extended to allow a criminal defendant standing to object as a third-party to race-based exclusions of jurors through peremptory challenges whether or not the defendant and the excluded jurors shared the same race. In so doing the

*Powers* Court discussed the importance of allowing all persons to be eligible to serve on a jury as codified at 18 U.S.C. § 243, which provides that no citizen otherwise qualified shall be disqualified for service as a juror on account of "race, color, or previous condition of servitude. . . ." *Powers v. Ohio,* 499 U.S. 400, 407-409.

The holding of *Batson* was further extended to civil cases in *Edmonson v. Leesville Concrete Company, Inc.*, 500 U.S. 614 (1991), a case where a black construction worker who was injured in a job-site accident at a federal enclave sued the concrete company for negligence. During voir dire, the defendant company used two of its three peremptory challenges to remove black persons from the prospective jury. The Court there held that a private litigant in a civil case may not use peremptory challenges to exclude jurors on account of race, since race-based exclusion violates equal protection rights of the challenged jurors, and that the exercise of peremptory challenges by the defendant in the district court was pursuant to a course of state action based on defendant's extensive use of governmental procedures within the judicial setting. *Edmonson*, 500 U.S. at 628.

Finally, in 1994 the Court held that based on the *Batson* decision and the cases defining the scope of that case, the Equal Protection Clause also forbids intentional discrimination on the basis of gender, in the same manner as it prohibits discrimination on the basis of race. *J.E.B. v. Alabama ex rel. T.B.,* 511 U.S. 127 (1994).

*Batson* has not been expanded beyond race and gender. The 8th Circuit declined to extend *Batson* to peremptory challenges based on age, reasoning that age, unlike race or gender, is not a suspect classification subject

to strict or even heightened scrutiny under the Equal Protection Clause. *Weber v. Strippit, Inc.*, 186 F.3d 907 (8th Cir. 1999), *cert. denied*, 120 S.Ct. 794.

Similarly, where a defendant asserted that the government's use of its peremptory challenges to remove persons with Irish surnames violated his Sixth and Fourteenth Amendment rights to a jury drawn from a fair cross section of the community and his Fourteenth Amendment right to equal protection of the laws, the First Circuit Court of Appeals determined that in order to show membership in a "cognizable group" for *Batson* purposes, a defendant must show that (1) the group is definable and limited by some clearly identifiable factor, (2) a common thread of attitudes, ideas or experiences runs through the group, and (3) a community of interests exists among the group's members, such that the group's interest cannot be adequately represented if the group is excluded from the jury selection process. *Murchu v. U.S.*, 926 F.2d 50, 54 (1st Cir. 1991), *cert. denied*, 502 U.S. 828. *Murchu* stated that a further ingredient of cognizability was that the group be one the members of which are experiencing unequal, i.e. discriminatory treatment, and which needed protection from community prejudices. *Murchu* quoting *United States v. Bucci*, 839 F.2d 825, 833 & n. 11a (1988) ("The important consideration for equal protection purposes is not whether a number of people *see themselves* as forming a separate group, but whether others, by treating those people unequally, put them in a distinct group.")

In this case, the juror peremptorily challenged by the Respondent was a middle-aged white male business owner. Greenway did not show at the time, and does not now attempt to show, that the excluded juror is a member of any cognizable racial group or suspect class. Further,

the Petitioner Greenway Enterprises, Inc. is a business corporation existing under Montana law and not itself a member of any protected or suspect class. It is difficult to understand how counsel for the Petitioner can assert that either the excluded juror or Greenway Enterprises, Inc. is a member of a group which is experiencing unequal, i.e. discriminatory treatment, and is entitled to protection under the Equal Protection Clause. Ironically, the only member of a cognizable racial group or suspect class is the Respondent, Tony Casiano, a person of Hispanic descent. The so-called *Batson* objection was not plausible at the time it was made in state district court. For that reason this case fails to raise a cognizable federal law based claim, and otherwise is an inappropriate candidate for the Court to address the Montana Court's application of a procedural bar to purported *Batson* claims.

**2. A timely objection requirement is not new or novel under Montana law, and would allow the Montana Supreme Court to rule *sua sponte* on that issue.**

This Court has held that only a "firmly established and regularly followed state practice" may be interposed by a state to prevent subsequent review by this Court of a federal constitutional claim. *James v. Kentucky*, 466 U.S. 341 (1984). That reasoning was followed in *Ford v. Georgia,* 498 U.S. 411 (1991) where the Court required that before the timing of a *Batson* objection could be used as a bar to the review of a federal constitutional claim based on *Batson*, the state court must have established and regularly followed a rule requiring that the objection must be made before the jury is sworn.

Irrespective of the correctness of characterizing Greenway's objection as one arising under *Batson*, it is clear that the Montana Supreme Court has long held that a defendant must raise an objection in a timely manner or the objection is waived. *Labbit v. Bunston* (1929), 84 Mont. 597, 277 P. 620.

Montana code requires that in order to preserve an objection to the admission of evidence for purposes of appeal, the objecting party must make a timely objection and state specific grounds for the objection. *See* Mont. R. Evid. 103(a)(1). To be timely, the objection must be made as soon as the grounds for the objection become apparent. *Hunt v. K-Mart Corp.* 1999 MT 125, 294 Mont. 444, 981 P.2d 275 citing *Kizer v. Semitool, Inc.* (1991), 251 Mont. 199, 207, 824 P.2d 229, 234 (citing McCormick on Evidence (3d ed.1984), § 52 at p. 126). *See also In re Marriage of Hayes* (1993), 259 Mont. 302, 856 P.2d 227.

In Montana criminal procedure, a specific statute requires that all challenges to the jury must be interposed before the jury is sworn except in certain circumstances. *See* Mont. Code Ann. § 46-16-117. The Montana Court has repeatedly stated that an important purpose of contemporaneous objections is to give the trial judge the first opportunity to correct any error. *See State v. Tucker*, 2000 MT 255, 301 Mont. 466, 10 P.3d 832; *State v. Clausell*, 2001 MT 62, 305 Mont. 1, 22 P.3d 1111; *State v. Finley* (1996), 276 Mont. 126, 915 P.2d 208 (overruled in part on other grounds by *State v. Gallagher*, 2001 MT 39, 304 Mont. 215, 19 P.3d 817); *State v. Weinberger* (1983), 204 Mont. 278, 665 P.2d 202.

In Montana it is a "firmly established and regularly followed state practice" to require objections to be

interposed in a timely manner. The Montana Supreme Court has a long-standing practice of refusal to address the merits of the case where the objections were not timely made.

## CONCLUSION

The Petition should be denied because this Court does not have the requisite jurisdiction under 28 U.S.C. § 1257 (2001). Additionally, the Petition should be denied because the Montana Courts have a firmly established and regularly followed state practice of refusing to address the merits of a case where an objection was not made in a timely manner.

Respectfully Submitted,

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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

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| TONY CASIANO,<br>Plaintiff,<br>vs.<br>GREENWAY ENTERPRISES, Inc.,<br>Defendant. | ) | CAUSE NO.<br>BDV-99-223 |

REPORTER'S TRANSCRIPT ON APPEAL

JURY TRIAL

Courtroom
Lewis and Clark County
Courthouse
Helena, MT
October 16, 17, 18, 19, 2000
Volume III (516-809)

HON. JEFFREY M. SHERLOCK,
DISTRICT JUDGE, PRESIDING

PREPARED BY: PENNY L. DOIG-MARTIN
OFFICIAL COURT REPORTER
HELENA, MONTANA

* * *

[558] than, say, Big John? Did anybody else have nicknames?

A. Well, Trent Wolstein gave me the nickname of Tex-Mex because I was from Texas and I'm Hispanic. There was other nicknames. Trent Wolstein was called

Buddha. Harry Vincent was called the Old Goat. And nicknames like that were around.

Q. In my notes I wrote this note because I wanted to be sure and ask you about it. And it doesn't fit in with what I've been asking you about right now. I want to ask you about the incident on June 10th where Mr. Ellermeyer showed your time sheet that you had moved a lead door on June 10th after you said you injured your back on June 5th.

Would you talk to the jury about moving a lead door on June 10th?

A. Lead door is really heavy. You know, one person couldn't be able to move it. This thing weighed a ton. I don't know exactly what it weighed. It weighed a lot. So we moved it with either the LOED. We got forklift, we moved it to the doorway. And from the doorway, we scooted it and got it on top of – I don't know what it's called. It's a little mechanical thing that

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